

2/28/96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

NL INDUSTRIES, INC., et al.,

Defendants,

and

CITY OF GRANITE CITY, ILLINOIS,

LAFAYETTE H. HOCHULI, and

DANIEL M. McDOWELL,

Intervenor-Defendants.

C.A. No. 91-CV578-JLF

BRIEF OF THE UNITED STATES FOR A RULING ON THE
APPROPRIATE SCOPE AND STANDARD OF REVIEW OF
AGENCY ACTION AND TO STRIKE AFFIDAVITS AND DOCUMENTS

EPA Region 6 Records Ctr.



258696

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EXHIBITS

- Exhibit A: October 18, 1994 letter from Defendants' liaison counsel, Mr. Joseph Nassif to U.S. EPA
- Exhibit B: January 13, 1995 letter from Granite City to U.S. EPA
- Exhibit C: Unpublished Opinions
- Exhibit D: September, 1995 "Draft EPA Integrated Report"
- Exhibit E: Final Guidance on Administrative Records for Selecting CERCLA Response Actions

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BRIEF OF THE UNITED STATES FOR A RULING ON THE
APPROPRIATE SCOPE AND STANDARD OF REVIEW OF
AGENCY ACTION AND TO STRIKE AFFIDAVITS AND DOCUMENTS

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), hereby re-submits its Motion and Memorandum in Support for a Ruling on the Appropriate Scope and Standard of Review of Agency Action and for a Protective Order Limiting the Scope of Discovery ("Record Review Motion").¹ Along with its original motion and accompanying memoranda, the United States submits this supplemental memorandum in support of that motion. The United States also requests that this Court strike the affidavits and

¹ The United States first submitted its Record Review Motion on May 11, 1992. On August 31, 1993, prior to ruling on the United States' motion, this Court dismissed all pending motions without prejudice to refileing those motions at a later date. On August 31, 1994, in response to the City of Granite City's motion to enjoin U.S. EPA's lawful cleanup of the Site, the United States re-submitted its Record Review Motion and Request for a Protective Order.

other documents attached to the Defendants' and City's brief as improper in this record review case.

I. Introduction

After three years, the Defendants and the City (collectively "the Defendants") have finally admitted that the scope of review of U.S. EPA's selected remedy should be based upon the administrative record under the arbitrary and capricious standard of review as expressly provided by CERCLA, 42 U.S.C. § 9613(j)(1)-(2). Consistent with judicial practice effectuating judicial review, this Court need look no further than the Administrative Record before the Court, which includes extensive submissions on behalf of the Defendants, and U.S. EPA's contemporaneous and substantial documents explaining its decision and responding to the Defendants' submissions.

Also consistent with administrative law, the Court has discretion to request assistance in its review by two means: seek briefs from the parties explaining the record; and seek independent expert advice to reduce technical complexities within the record to more manageable lay terms.

Notwithstanding clear judicial mandate, the Defendants claim that this Court should allow supplementation of the Record, permit discovery beyond the Record, and hold evidentiary hearings.² While they pay lip service to the concept of limited

² Defendants' brief only addresses concerns with the Administrative Record concerning U.S. EPA's selection of the residential cleanup level. Since Defendants do not object to the Administrative Record concerning the other issues at the Site -- the groundwater remedy, the remediation of the

(continued...)

judicial review, the Defendants apparently seek to engage in full-scale litigation on issues concerning U.S. EPA's selected remedy as if this Court were engaged in de novo review. Through tortured arguments, Defendants claim that discovery is permitted. With discovery, they seek to create a new record in this Court, thereby circumventing the administrative process they recognize is appropriate.

When U.S. EPA agreed to reopen the Administrative Record to reconsider the residential soil cleanup level, the Defendants gained an additional opportunity to participate in the remedy selection process through the submission of whatever data and analysis they believed was pertinent. Instead, they have withheld data and other information and now claim that the typical course of litigation -- discovery and evidentiary hearings -- should apply.

Defendants further confuse the issue by claiming that U.S. EPA's selected remedy is arbitrary and capricious because it is not supported by the Record. As we set forth below, this claim is wrong and, in any event, it is precisely the substantive argument that this Court asked the Defendants not to present at this time.

The Defendants also assert that this Court may look at supplemental materials to assist the Court in its review of the

²(...continued)
waste pile, and the remediation of battery-chip materials, the Court is free to proceed with its review of these issues based upon the Administrative Record under the arbitrary and capricious standard of review.

record. We agree. However, the Court is limited in the form of assistance it may receive. The most proper form is for the Court to appoint a technical advisor to assist the Court in deciphering technical complexities in the record to effectuate judicial review. In fact, this Court has already decided to proceed along that very course.

II. Statement of the Facts

Pursuant to the telephonic status conference with the Court on October 11, 1995, the Defendants asked to file an additional brief on the scope of judicial review. In allowing this additional briefing, the Court was very clear that only issues as to the scope of review were to be submitted to the Court -- leaving for a later date substantive arguments concerning the propriety of U.S. EPA's selected remedy.³ That is, no statement of the facts is necessary to this Court's decision on this issue. Nevertheless, the Defendants go to considerable lengths detailing alleged inconsistencies in U.S. EPA's selected remedy for the Site. See Defendants' brief, pp. 4-9. Their recitation of events and claims of U.S. EPA's inconsistency are false and, in any event, are not relevant to the issue presently before the Court. At the appropriate time, the United States will respond to the Defendants' incorrect and premature allegations.

³ In the first page of their brief, the Defendants mistakenly assert that the issue presently before this Court is the scope of review of U.S. EPA's Administrative Order. Although the same scope of review, that is "arbitrary and capricious" based upon the "administrative record," applies to U.S. EPA's Order, in this Phase I of the case, the Court is faced only with the scope of review, and ultimate adequacy, of U.S. EPA's selected remedy. Issues relating to the Order have been designated as falling in Phase III.

III. Procedural Posture

This case is in the proper procedural posture for judicial review of U.S. EPA's Administrative Record to resolve Phase I of the case. In the Spring of 1992 when the United States first sought a ruling from this Court on the scope of judicial review, the Defendants (not the City) objected on the grounds that some of the Defendants had not received proper notice of the timing of U.S. EPA's public comment period on the remedy for this Site. While the United States continues to disagree with that claim,⁴ U.S. EPA, in an attempt to reach a settlement with the Defendants which would obviate the need for costly litigation, agreed to reopen the Administrative Record to receive the Defendants' comments on the residential soil cleanup standard. In fact, U.S. EPA delayed this reopening until Dr. Kimbrough, the City's own expert, finalized her report on the Madison County Lead Exposure Study.

On October 14, 1994, U.S. EPA reopened the Administrative Record to receive additional information on the appropriate cleanup standard for residential soils at the Site. See Proposed Plan, Supplemental Administrative Record ("SAR") No. 148. In reopening the comment period, U.S. EPA announced in its Proposed Plan that it still believed that the 500 ppm cleanup level would be fully protective of public health. Id. U.S. EPA also added

⁴ The few defendants that alleged U.S. EPA failed to provide proper notice cannot and have not alleged that defense now. This is because U.S. EPA notified each of the Defendants individually of their additional opportunity to voice any concerns and objections when U.S. EPA reopened the Administrative Record.

additional material to the Record explaining its view. This material was available to the Defendants, as well as public, for comment. This material included, among other documents: Dr. Alan Marcus'⁵ Comments on the Madison County Lead Exposure Study (SAR No. 135); Dr. Marcus' "Preliminary Assessment of Data from the Madison County Lead Exposure Study and Implications for Remediation of Lead-Contaminated Soil" (SAR No. 145); and articles on lead exposure from technical and medical journals (generally, SAR Nos. 142-144, 146-148).

All the Defendants were given more than ample time to submit comments on U.S. EPA's proposed remedy. The Defendants were given three times the normal comment time⁶ after they repeatedly requested that U.S. EPA extend the November 14, 1994 deadline until December 14, 1994,⁷ and then again until January 13, 1995.⁸

During the comment period, the Defendants submitted numerous and voluminous documents that they claim support a different cleanup level for lead in residential soils than U.S. EPA's selected cleanup level. See SAR Nos. 366 and 377. Furthermore,

⁵ Dr. Marcus is employed in U.S. EPA's Environmental Criteria and Assessment Office in North Carolina. Dr. Marcus has a Ph.D. in statistics and extensive experience in epidemiology and toxicology.

⁶ The NCP requires a 30-day public comment period. 40 C.F.R. § 300.430(f)(3)(i).

⁷ See October 18, 1994 letter from Defendants' liaison counsel, Mr. Joseph Nassif to U.S. EPA, attached as Exhibit A.

⁸ See SAR No. 336. Furthermore, the City requested another extension of the comment period in order to submit the data and the study. See January 13, 1995 letter from Granite City to U.S. EPA, attached as Exhibit B. After not hearing from the City for several weeks, U.S. EPA denied the City's request. See SAR No. 347. To date, no Defendant has provided any of this data or any study to U.S. EPA.

even after the close of the 90-day comment period, U.S. EPA included in the Administrative Record additional comments and materials offered by the Defendants. See SAR No. 350.⁹

Thereafter, U.S. EPA completed its evaluation and detailed response to all the comments it received, including the Defendants' voluminous comments. Nearly all the comments received supported U.S. EPA's soil cleanup decision. See SAR Nos. 356, 357, 369. U.S. EPA then concluded that Defendants' belief that U.S. EPA overstated the risks associated with lead contaminated soils at this Site was mistaken. See DD/ESD, SAR No. 377. U.S. EPA's newly certified Administrative Record has now placed this Court in a posture to immediately review U.S. EPA's remedy based upon the Administrative Record. See also United States' Request for Status Conference and Motion for Entry of Briefing Schedule, filed October 5, 1995.

IV. CERCLA Prescribes and Limits Judicial Review of U.S. EPA's Selected Remedy

There is no question that the judicial decision in Phase I of this case concerning U.S. EPA's selected remedy must be based on the administrative record under an arbitrary and capricious standard of review. As this Court recognized in its letter to the parties, dated January 4, 1995, judicial review of U.S. EPA's remedy is limited to the administrative record pursuant to Section 113(j)(1) and (2) of CERCLA, 42 U.S.C. § 9613(j)(1) and (2). Those sections provide:

⁹ Even as of August 1, 1995, the date of that submission, neither the Bornschein data nor the study were provided to U.S. EPA.

(1) Limitation. In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard. In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law. (Emphasis added).¹⁰

Legislative history of CERCLA's limitation on judicial review reveals Congress' expectation that:

Limiting judicial review of response actions to the administrative record . . . expedites the process of review, avoids the need for time-consuming and burdensome discovery, and assures that the reviewing court's attention is focused on the information and criteria used in selecting the response

H.R. Rep. No. 99-253, 99th Cong. 2d Sess. 81. (emphasis added).¹¹

Defendants have not cited to any CERCLA remedy case where a court has declined to follow Section 113(j)'s limitation on review. In fact, the case law is replete with decisions upholding record review, based upon both Congress' explicit restrictions in CERCLA, and general principles of administrative law.¹²

¹⁰ U.S. EPA has fully complied with all procedural requirements in Sections 113(k) and 117 of CERCLA, 42 U.S.C. §§ 9613(k) and 9617, and in the NCP, 40 C.F.R. § 300.430(f), to enable this Court to limit the Defendants' disagreement over U.S. EPA's decision to the Administrative Record. See Section VI.2.d., *infra*.

¹¹ See also S. Rep. No. 11, 99th Cong., 1st sess. 57 (1985).

¹² See United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO"), 810 F.2d 726, 748 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Keystone Sanitation Co., Civ. Action 1:CV-93-1482

(continued...)

While the Seventh Circuit has not been called upon to address record review issues in the context of a CERCLA case, it has addressed record review issues in an environmental matter. The Seventh Circuit has stressed that judicial review should be based on "the administrative record already in existence, not some new record made initially in the reviewing court." Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 444 (7th Cir. 1990). See also FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); Camp v. Pitts, 411 U.S. 138, 141, 143 (1973); Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619 (1966). The Cronin court held that in reviewing an agency decision, "the

¹²(...continued)
(M.D. Pa. August 7, 1995) (denying all discovery except as to the completeness of the record where the Agency conceded that the certified record was not complete) (All unpublished opinions are attached as Exhibit C); United States v. Velsicol Chemical Corp., Civ. Action 4:94-CV-258-HLM (N.D. Ga, August 29, 1995) (denying discovery on the selection and adequacy of U.S. EPA's response action even in light of defendant's intention to seek to supplement the administrative record); United States v. Shell Oil Co., No. CV-91-0589 RJK (Feb. 16, 1993) (the scope of review of a response action shall be limited to the administrative record and the arbitrary and capricious standard of review shall apply); U.S. v. Princeton Gamma-Tech, Inc. ("PGT"), 817 F. Supp. 488, 491-494 (D.N.J. 1993), rev'd and remanded on other grounds, 31 F.3d 138, 149-150 (3rd Cir. 1994); U.S. v. Gurley Refining Co., 788 F. Supp. 1473, 1481, 1482 n.9 (E.D. Ark. 1992) (refusing to consider expert testimony as outside the administrative record), aff'd in part, rev'd in part on other grounds, 43 F.3d 1188, (8th Cir. 1994), cert. denied 116 S. Ct. 73 (1995); United States v. Mexico Feed and Seed Co., 729 F. Supp. 1250 (E.D. Mo. 1990); In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution ("Acushnet"), 722 F. Supp. 888, 891-93 (D. Mass. 1989); United States v. Wastecontrol of Florida, 730 F. Supp. 401, 405 (M.D. Fla. 1989); United States v. Bell Petroleum Services, Inc., 718 F. Supp. 588, 591 (W.D. Tex. 1989); United States v. Seymour Recycling Corp., 679 F. Supp. 859, 861 (S.D. Ind. 1987); United States v. Nicolet, No. 85-3060, 14 Chem. Waste Lit. Rptr. 130, 17 Env't'l L. Rep. 21091 (E.D. Pa. May 12, 1987); United States v. Rohm & Haas Co., 669 F. Supp. 672, 683-84 (D.N.J. 1987); United States v. Mattiace Industries, No. 86-1792HB, 15 Chem. Waste Lit. Rptr. 351 (E.D.N.Y. Sept. 24, 1987); United States v. Vertac Chemical Corp., 671 F. Supp. 595, 614 (E.D. Ark. 1987), vacated without opinion in part, 855 F.2d 856 (8th Cir. 1988); United States v. Northernair Plating Co., 685 F. Supp. 1410, 1415 (W.D. Mich. 1988), aff'd sub nom. United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); United States v. Western Processing Co., No. C83-252M, 11 Chem. Waste Lit. Rptr. 623, 625 (W.D. Wash. Feb. 19, 1986); United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985).

district court is a reviewing court, like this [appellate] court; it does not take evidence." Id. at 443. Furthermore, where the agency decision is set forth in a "substantial document," evidentiary hearings are improper. Cronin, 919 F.2d at 444. "All that the plaintiffs are entitled to do in the courts is to try to persuade the district judge . . . on the basis of the evidence before the [agency] when [it] made [its] decision, that the decision is unlawful." Id. at 445.

Under the "arbitrary and capricious" standard, the "scope of review . . . is narrow." Board Of Trustees Of Knox County Hosp. v. Sullivan, 965 F.2d 558, 564 (7th Cir. 1992), cert. denied, 506 U.S. 1078 (1993).

[T]he court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.

Old Republic Ins. Co. v. Federal Crop Ins. Corp., 947 F.2d 269, 282 (7th Cir. 1991) quoting, inter alia, United States v. An Article Of Device. . . Diapulse, 768 F.2d 826, 830 (7th Cir. 1985), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 406 (1971).

The Administrative Record here provides this Court with the contemporaneous record compiled by U.S. EPA and the "substantial document" embodying the remedy decision for the NL Site necessary to satisfy the standards set forth in CERCLA. See also Cronin, 919 F.2d at 444-445; Camp v. Pitts, 411 U.S. at 142-143.

V. Discovery Is Prohibited in a Record Review Case

Review on the administrative record eliminates the need for discovery, as the administrative record contains all that is relevant to the decision in issue. See United States v. Morgan, 313 U.S. 409, 422 (1941); Cronin, 919 F.2d at 444. A party is limited to that record, and may not seek to expand the record by taking depositions to explore the decision maker's mental processes. Morgan, 313 U.S. at 422; Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 72 (D.C. Cir. 1987); Warren Bank v. Camp, 396 F.2d 52, 56-57 (6th Cir. 1968).

The record review limitation is pragmatic; it reflects that record compilation, with "adequate safeguards to insure that the agency gives serious consideration to objections and comments by parties," is less resource-intensive than litigation. See Lone Pine Steering Committee v. EPA, 777 F.2d 882, 887 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). "Matters not considered by the agency . . . are outside the record . . . , are legally irrelevant, and therefore are not discoverable under Fed. R. Civ. P. 26." Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981).

Furthermore, adequate evaluation of the complex scientific issues is more likely to result from a public administrative process conducted by agencies with specialized scientific expertise. United States v. Seymour Recycling Corp., 679 F. Supp. 859, 862 (S.D. Ind. 1987). The courts are particularly ill-equipped to handle such issues through normal litigation, and

the general public does not have the resources or the procedural vehicle to protect its interests in the courtroom. Rather, U.S. EPA has ensured public participation, and elicited response from the affected public and all the responsible parties concerning the dangers at the Site.

A judicial trial also may create significant incentives for parties to withhold scientific data for use at trial. A public administrative process creates precisely the opposite incentive; all parties are publicly required to disclose their scientific evidence and conclusions if they are to be considered. Here, U.S. EPA has disclosed all available scientific evidence in its possession and has provided its conclusions on that evidence on numerous occasions to the public and the Defendants. On the contrary, the Defendants have failed to provide the data for Dr. Bornschein's "study" even though that data has existed as far back as November 1994. See Defendants' Brief, Exhibit F. Defendants have also failed to provide their conclusions on that data, simply attaching a short conclusory affidavit from Dr. Bornschein which he concludes from his ill-described study (5 sentences), that U.S. EPA's remedy may be inadequate (5 sentences). Id.

In addition to being irrelevant, discovery in the reviewing court undermines the integrity of the administrative process. The Supreme Court has observed that an administrative proceeding "has a quality resembling that of a judicial proceeding." Morgan, 313 U.S. at 422. The Court noted that "although the

administrative process has had a different development and pursues somewhat different ways from the courts, they are deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." Id. at 422.

Record review also conserves judicial resources. Since all the admissible evidence is already in the administrative record, see Don't Ruin Our Park v. Stone, 749 F. Supp. 1388 (M.D. Pa. 1990), aff'd without opinion, 931 F.2d 49 (3d Cir. 1991), "review on the record eliminates the need for discovery." United States v. Rohm & Haas, 669 F. Supp. 672, 681 (D.N.J. 1987) (disallowing discovery, and noting that judicial review of decision-making based upon the administrative record "would not be greatly enhanced by the presentation of live testimony or the use of cross-examination"); U.S. v. Princeton Gamma-Tech, Inc. ("PGT"), 817 F. Supp. 488, 491-494 (D.N.J. 1993), rev'd and remanded on other grounds, 31 F.3d 138 (3rd Cir. 1994) (citations omitted). Thus, "[t]he fact-finding capacity of the district court is unnecessary." Morgan, 313 U.S. at 422.

Nevertheless, the rule is evenhanded. The decision of the federal agency must be defended upon the record, and not by post hoc rationalizations presented for the first time in the reviewing court. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

In seeking discovery to supplement the administrative record, Defendants rely upon Asarco, Inc. v. EPA, 616 F.2d 1153

(9th Cir. 1980), and United States v. Akzo Coatings of America, Inc., 949 F.2d 1409 (6th Cir. 1991). Properly read, however, neither case provides support for Defendants' position. Asarco involved judicial review of a U.S. EPA order of violation issued under the Clean Air Act. In finding the ordered action arbitrary and capricious and remanding the matter to U.S. EPA for further development, the Ninth Circuit found that, "when highly technical matters are involved," Asarco, 616 F.2d 1160, the reviewing court may "go outside the record to properly evaluate agency action." Id. at 1159.¹³ But the court cautioned that "when a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency," and suggested that the type of extra-record evidence to be considered should be limited to that which is merely "'explanatory' of the original record and contain[ing] no new rationalizations." Id. at 1159. On these grounds, the court ruled that "the district court went too far in its consideration of evidence outside the administrative record", id. at 1160, in conducting a four-day trial at which the plaintiff called seven witnesses, three of them experts:

Most of the expert testimony . . . should not have been admitted or at least not have been considered for the purpose of judging the wisdom of the EPA's stack-testing requirement. This technical testimony was

¹³ Where complicated, scientific matters are involved, courts routinely defer to agency expertise. Akzo, 949 F.2d at 1425 ("[It is] Congress' intent that in this highly technical area, decisions concerning the selection of remedies [at CERCLA sites] should be left to EPA, and those decisions should be accepted or rejected - not modified - by the district court under an arbitrary and capricious standard.").

plainly elicited for the purpose of determining the scientific merit of the EPA's decision [W]e can only conclude that the extent of the scientific inquiry undertaken at trial necessarily led the district court to substitute its judgment for that of the agency.

Id. at 1161.

In Akzo, 949 F.2d at 1427-29, the Sixth Circuit affirmed the district court's entry of a CERCLA consent decree and found that District Court should have considered a single technical affidavit in evaluating a CERCLA consent decree. That decision was based on the fact that the affidavit was being offered in connection with the public comment period that CERCLA requires before a court may approve a consent decree. See 42 U.S.C. § 9622(d)(2). But in holding that the district court should have considered the affidavit, the court urged circumspection, stating that "federal courts are ill-equipped to engage in de novo review of such evidence" and explicitly expressed reservations about its decision. Id. at 1428-29. A proper reading of Asarco and Akzo will require denial of the broad-ranging discovery sought by the Defendants.

VI. Defendants have Failed to Show that any of the Four Narrow Exceptions for Court's to Review Materials Outside the Record Exist

Under well-established principles of administrative law, which is expressly incorporated into Section 113(j)(1) of CERCLA, use of materials outside the administrative record is rarely proper and is only permitted where persons seeking to challenge the agency action first establish that: (1) judicial review is frustrated because the record fails to explain the agency's

action; (2) the record is incomplete; (3) the agency failed to consider all the relevant factors; or (4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith. See Defendants' Brief, pp. 31-37.¹⁴

The Defendants fail to make any credible showing that any of these exceptions apply.

1. Judicial Review is Not Frustrated Here Because the Certified Administrative Record Fully Explains U.S. EPA's Decision

U.S. EPA based its cleanup decision on the full Administrative Record now before the Court. See Certification of Administrative Record, filed March 31, 1992, and Certification of Supplemental Administrative Record, filed October 18, 1995. Although Defendants may disagree with U.S. EPA's decisions, U.S. EPA has not failed to explain its action. On the contrary, the Defendants claim that U.S. EPA's DD/ESD is a "lengthy and complex analysis of highly technical issues." Defendants' brief, p. 19. We agree.

The DD/ESD is comprised of four sections: i) a relatively non-technical explanation of U.S. EPA's remedial decision; ii) a response, technical in part, to each of the comments U.S. EPA received from interested persons, including the Defendants, concerning the residential soil cleanup level; iii) a response, technical in part, to each of the comments U.S. EPA received from

¹⁴ The Defendants list two other factors in their brief: post-record information and technical complexity. See Defendants' Brief, p. 11. In neither of these circumstances will a court be permitted to allow discovery. See discussion at Section VI.2.b. and VI.2.c., below.

interested persons, including the Defendants, concerning cleanup of other areas of the Site; and iv) an expert technical response to the technical submissions by the Defendants. (SAR No. 377). This is exactly the contemporaneous explanation of agency action required to effectuate judicial review required by Camp v. Pitts, 411 U.S. at 142-43. See also Cronin, 919 F.2d at 444, 445.

2. The Certified Administrative Record is Complete

Although some courts have held that limited "discovery" may be had upon a showing that the complete administrative record has not been filed with the court, Natural Resources Defense Council v. Train, 519 F.2d 287, 292 (D.C. Cir. 1975) (specifically identified documents missing from the record), such "discovery" concerns only the completeness of the record and does not include inquiry into extra-record matters concerning the substance of the decision in question. Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 286 (D.C. Cir. 1981); Asarco, 616 F.2d at 1160. To obtain even that discovery, however, the party challenging the agency action must make a substantial showing that it has a reasonable basis for believing that the record is incomplete. Train, 519 F.2d at 291; Saha Thai Steel Pipe Co. v. United States, 661 F. Supp. 1198, 1202 (Ct. Int'l Trade 1987); County of Bergen v. Dole, 620 F. Supp. 1009, 1016 (D.N.J. 1985) ("substantial showing" required), aff'd without opinion, 800 F.2d 1130 (3d Cir. 1986); Texas Steel Co. v. Donovan, 93 F.R.D. 619, 621 (N.D. Tex. 1982). Most importantly, such discovery is only permitted where specifically identified documents exist, or

certain specified criteria were evaluated and not included in the record. Saha Thai Steel Pipe Co., 661 F. Supp. at 1203. Even if such a showing is made, the appropriate course is not for courts to permit extra record discovery or to review matters outside the record; rather, in such a circumstance, the appropriate course would be to remand the matter to the agency for further consideration. Camp v. Pitts, 411 U.S. at 143; Asarco, 616 F.2d at 1160; Exxon, 91 F.R.D. at 34.

Defendants cite to four cases for the proposition that a mere allegation of incompleteness permits untethered discovery. Defendants' reliance on these cases is misplaced. Such a proposition would abrogate the limitation on judicial review entirely.

Defendants cite to Dopico v. Goldschmidt, 687 F.2d 644, 654 (2d Cir. 1982), in which the Department of Transportation failed to include in the administrative record filed with the court specific identified documents which were in existence at the time of the agency's decision, which were "fundamental" to the agency's decision, and which were required to be evaluated by statute. In remanding to the district court for discovery to complete the record, the Second Circuit did not address the clear Supreme Court authority that the record be returned to the agency for further development. See e.g. Camp v. Pitts, 411 U.S. at 143.

In Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982), the Ninth Circuit recognized that the proper course, where

the record failed to contain specifically identified documents, was to remand to the agency for further development. However, in Johnson, the Circuit Court found that remand was not available given Congress' mandate for time-specific expedited Circuit Court review of the agency decisions in this matter. Id. at 795.¹⁵ No such emergency review is required by Congress in this case, and U.S. EPA has not sought emergency treatment of this matter.

Also, in United States v. Keystone Sanitation Co., CV-93-1482 (M.D. Pa. July 31, 1995), the district court allowed limited discovery where the agency conceded that the record before the court was incomplete. The copy of the record filed with the court admittedly failed to physically contain certain documents that were in existence before the comment period expired, and which were relied upon and considered by U.S. EPA. Id. at 12. In allowing discovery, the court cautioned that discovery would be limited to "inquiring about [U.S. EPA's] reasons for failing to include all the relevant documents in the administrative record at the time it was signed, and the process by which they decided to include [the subsequently identified] additional documents." Id. at 13.

Finally, in Texas Steel Co. v. Donovan, 93 F.R.D. 619 (N.D. Tex. 1982), the court was presented with a challenge to an

¹⁵ In enacting the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 et seq., Congress recognized the need for prompt action on power supply issues. The Act required challenges to DOE's administrative decision to be brought in the Circuit Court within 90 days of that decision. Accordingly, because the Court was pressed to make a speedy decision to effectuate the purposes of the statute, remand was not feasible.

agency's regulation, not with a specific decision based upon its own administrative record as in this case. The regulation concerned the power of the Occupational Safety and Health Administration to obtain an ex parte warrant. Although denying the motion to compel discovery, the court cautioned that additional discovery should be merely explanatory of the record and should neither seek nor contain new rationalizations. Id. at 621.

a. Defendants' Incompleteness Claim is Unfounded

No Defendant has proffered any evidence that the Administrative Record is incomplete. U.S. EPA has certified that the Record "constitute[s] the entirety of documents developed or received by U.S. EPA for the Site . . . that were relied upon or considered by U.S. EPA in the selection of response actions for this Site, including the selection of the remedial action." See Certification of Supplemental Administrative Record, filed October 18, 1995. At no time do Defendants identify any document, study or report which U.S. EPA has failed to include in the filed Administrative Record and which was relied upon or considered by U.S. EPA. Rather, the Defendants claim, without sufficient support and improperly in this procedural brief, that U.S. EPA's decision is substantively wrong. Such allegations do not effect the completeness of the Record.

Defendants assert that discovery should be permitted because U.S. EPA has not adequately explained its use of the IEUBK model and will not provide the rationale for the parameters chosen for

the model. See Defendants' Brief, p. 11.¹⁶ This is simply untrue. Moreover, even if true, it would not permit discovery to supplement the record; it may go to whether U.S. EPA's remedy decision is arbitrary and capricious. As more fully explained in the DD/ESD and ROD, U.S. EPA's selected remedy at this Site is not based solely upon the IEUBK model. In addition to the IEUBK model, U.S. EPA relied upon, among other things, site-specific information, U.S. EPA's experience at other lead smelter CERCLA Sites, numerous studies of lead in the environment, the biological and physiological aspects of lead in relation to humans, and other computer models designed to address lead contaminated CERCLA sites. See DD/ESD, SAR No. 377; ROD, AR No. 217.¹⁷ Also, in his report attached to the DD/ESD, Dr. Marcus identifies each of the parameters used in running the IEUBK model, and fully explained the use these parameters. It is also absurd that Defendants do not know what data was used in running the IEUBK model since all the data used in running the model was

¹⁶ Defendants also claim that a statement in the DD/ESD that a majority of the residents in the cleanup area support U.S. EPA's cleanup is unsupported in the Record. It appears Defendants have not read the Record. Transcripts of the public meetings, citizen comments, eyewitness accounts, and access agreements all confirm that the vast majority of the affected community who participated in the administrative process support U.S. EPA's cleanup decision. See SAR Nos. 356, 357, 369, 377.

¹⁷ The Integrated Exposure Uptake Biokinetic ("IEUBK") "is designed to predict blood lead concentrations for children given various concentrations of lead in the environment." See DD/ESD, p. 10 (SAR No. 377).

supplied by either the Defendants' own expert, Dr. Kimbrough,¹⁸ or was previously available to the Defendants in the Record.

Furthermore, U.S. EPA's sixteen volume Administrative Record and twenty-one volume Supplemental Administrative Record fully explain its decision in the 76 page ROD and 333 page DD/ESD. Therefore, Defendants' claim that the Agency has not provided the rationale, the parameters, and the data is untrue. What they are really saying is that the basis provided is inadequate in their view. Again, this goes to the substantive question of whether U.S. EPA's decision is arbitrary and capricious -- not an area requiring discovery. See Environmental Defense Fund v. Costle, 657 F.2d at 286; Asarco, 616 F.2d at 1160.

b. No Post-Decisional Documents Exist for Inclusion in the Record And Defendants Have Not Requested Inclusion of Any Alleged Documents

Defendants wish to supplement the Administrative Record with two documents -- an affidavit by Dr. Bornschein and a U.S. EPA draft report entitled "Urban Soil Lead Abatement Demonstration Project, September 1995 Review Draft. See Defendants' Brief, Exhibits F and G. Neither of these documents meet the necessary requirements for inclusion in the Record at this time.

Both the NCP and applicable case law indicate that, absent some showing that the information the litigant seeks to supply the reviewing court is so significant as to compel U.S. EPA's

¹⁸ In fact, Dr. Kimbrough has refused to provide all the data she possesses in connection with the Site to U.S. EPA. And, as their own expert, Dr. Kimbrough had all of this data, the IEUBK model, U.S. EPA's original ROD with IEUBK analysis, and Dr. Marcus' preliminary IEUBK analysis. Therefore the Defendants were perfectly capable of performing their own analysis.

reconsideration of its decision and that the information could not have been submitted during the appropriate comment period, extra-record information should be excluded. The NCP provides:

[U.S. EPA] is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action. (Emphasis added).

See 40 C.F.R. § 300.825(c). See also 40 C.F.R. §§ 300.815(d).¹⁹

Defendants have made no assertion that the two documents they seek to add contain significant information not previously before the agency. Furthermore, at no time has any Defendant formally requested that U.S. EPA evaluate any additional information pursuant to the NCP, 40 C.F.R. § 300.825(c).²⁰ As previously stated, the defendants have had ample opportunity to provide U.S. EPA with data and expert opinions concerning their

¹⁹ In Akzo, 949 F.2d at 1428, the Court interpreted these provisions in response to a challenge to a settlement in a CERCLA case. Relying in part on 40 C.F.R. § 300.825(c), the Akzo court stated that when evaluating whether additional information outside of the administrative record should be considered, the reviewing court must determine whether the information [provided] ... is of such significance that the agency must reconsider its decision in light of the new information, or whether the [information] when weighed against all of the other evidence available to EPA at the time [of its decision] is insufficient to overcome the deference accorded EPA's action by a reviewing court applying the arbitrary and capricious test.

Akzo, 949 F.2d at 1428 (citations omitted).

²⁰ As discussed above in footnote 8, the City's attorney, in his January 13, 1995 letter suggested that the City would submit the Bornschein data to U.S. EPA pursuant to 40 C.F.R. § 825(c). See Exhibit B. The City's attorney, at that time, advised U.S. EPA that he would have a time frame for the completion of Dr. Bornschein's study "within a few days." Until filing its brief in December, 1995, the City never provided U.S. EPA any information about the data collected in that study.

objections to the selection of the remedy. Furthermore, "it is not 'appropriate ... for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.'" Rybachek v. EPA, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990).

Dr. Bornschein's "study" involved data collection as early as the Fall of 1994, and sometime in 1995. In fact, as this Court is aware, U.S. EPA permitted this data collection which was to have been collected in conjunction with U.S. EPA's remediation of 17 homes remediated in the Fall/Winter of 1994 which were the subject of the Stipulation entered into before this Court on September 21, 1994. See Transcript of In-Court Agreement, SAR No. 351, pp. 10-11. Nowhere do the Defendants explain why this data was not available a year later for possible inclusion in the Administrative Record pursuant to the NCP, 40 C.F.R. § 300.825(c).²¹ U.S. EPA requested this data on December 5, 1994 (SAR No. 336) and again on August 16, 1995 (SAR No. 354). The data was never provided. As of the writing of this brief, after repeated requests, the Defendants still have not provided any data or any "study."

Defendants also seek to supplement the administrative record by submitting a portion of a September, 1995, "Review Draft" of the "EPA Integrated Report" of the "Urban Soil Lead Abatement

²¹ This does not mean the data and study would qualify for such inclusion. However, by holding the data and study for this long, the Defendants apparently intend to sandbag the administrative process, and to delay the ultimate review by this Court of the Administrative Record.

Demonstration Project" (the "Three Cities Study"). See Defendants Brief, Exhibit G. As noted above, Defendants have not appropriately sought to submit this document for inclusion in the administrative record pursuant to 40 C.F.R. § 825(c). Defendants have not established that this information is not "contained elsewhere in the administrative record" or that the information is so significant to compel U.S. EPA's reconsideration of its decision or "substantially support[s] the need to significantly alter the response action." 40 C.F.R. § 825(c) (Emphasis added).

Instead, Defendants seek to persuade this Court that it should expand its review beyond the administrative record based on selected lines read out of context from selected pages of a "several hundred page document, stamped "Draft-Do Not Cite or Quote," and which is not yet final."²² (The full text of the September, 1995 "Draft EPA Integrated Report" is attached hereto as Exhibit D). Defendants fail to point out that the Three Cities Study - a study conducted by EPA in which Dr. Marcus (and Dr. Bornschein) were participants - has been ongoing since 1986. Also, Defendants do not point out that the information taken from the Three Cities Study, along with numerous other scientific studies and reports, is contained in the Administrative Record

²² A previous draft report of this study is contained, in its entirety, in the Administrative Record. This is consistent with U.S. EPA's approach to review contemporary information possible within the scientific field to assist the Agency in making remedy decisions. However, the Defendants' wish to include a more recent draft of the study, and only a partial draft at that, is insufficient to raise to the level of judicial supplementation of the Record. Especially where the original draft report was only one of many documents and analyses U.S. EPA considered in selecting its remedy for this Site.

upon which the agency based the DD/ESD. See SAR, 123, 124, 125, 126 (July 15, 1993 Draft of the "Urban Soil Lead Abatement Demonstration Project", Vol.s 1 - 4).²³ Clearly, the information derived from the Three Cities Study was known to and considered by U.S. EPA when arriving at its decision for the remedy at the Site.

The defendants should not be allowed to submit any additional information outside of the Record that was not before the Agency at the time of the ROD or the DD/ESD. Although the Defendants recognize that the NCP, 40 C.F.R. § 300.825(c), contains a mechanism, consistent with administrative law, to address new information in the record, they believe this Court, not U.S. EPA, should add and consider those documents independently from the Agency. That is not the law. Rather, the proper course is for Defendants to submit their allegedly new and significant documents to U.S. EPA, along with their supporting arguments for inclusion into the record, and their arguments for why these documents "substantially support the need to significantly alter the [remedy]." 40 C.F.R. § 300.825(c). Then, U.S. EPA can respond to the documents, and to Defendants' arguments, all of which will be added to the Administrative Record. Id. Only then will the Defendants' administrative remedies be satisfied -- clearing the way for review by this Court under the arbitrary and capricious standard. Furthermore,

²³ Also, as is apparent from the "Draft" status of these reports, it is clear that the conclusions which may be drawn from the Three City Study data is still evolving.

none of this "new" material should delay this Court's present review of the Record. If the Court were to continue to wait for untimely submissions, or the continuing evolution of the field of health risks associated with lead contamination, this case would never come to an end.

c. U.S. EPA Fully Complied with CERCLA, the NCP and U.S. EPA Guidance To Satisfy Due Process Concerns

For sites that are placed on the National Priorities List ("NPL") promulgated pursuant to CERCLA § 105, 42 U.S.C. § 9605,²⁴ the NCP prescribes a three step administrative process for selecting a remedy for a site: (1) completion of a remedial investigation and feasibility study ("RI/FS");²⁵ (2) public notice and comment on a proposed plan for remedial action; and (3) selection of the remedial action by U.S. EPA. The final cleanup decision is contained in a ROD or DD, and is based upon a written record that includes the RI/FS, other reports and data compiled by U.S. EPA, comments from potentially responsible parties and the public, U.S. EPA's response to these comments, and other relevant material. 40 C.F.R. § 300.430. There is no

²⁴ The NPL is a list of those sites in the nation that have been determined to warrant the highest priority for remedial action. This Site was placed on the NPL on June 10, 1986 (51 Fed. Reg. 21054).

²⁵ Remedial Investigations involve data collection and site characterization to determine the nature and extent of the contamination at the site. Activities during the RI typically include sampling and monitoring of soil, groundwater, and air at and near the site. In addition to determining the need for remedial action, the RI assesses the extent to which contaminants have migrated from the site and the need for remedial action to control such migration. The Feasibility Study is conducted after the RI to identify and evaluate alternative remedial actions. See generally 40 C.F.R. § 300.68 (1989); 40 C.F.R. § 300.430 (1990).

dispute that U.S. EPA has complied with each of these requirements.

Defendants claim that their due process rights were violated because U.S. EPA acted outside of the NCP, 40 C.F.R § 300.430(f)(3)(i)(B) and (C), and its own guidance, by denying Defendants the opportunity to comment on U.S. EPA's response to the Defendants' submission to the reopened Administrative Record. Defendants' Brief, p. 14-19. This argument has no merit.

First, this is the same argument that the court in United States v. Rohm and Haas Co., 669 F. Supp. 672, 679-680 (D.N.J. 1987) rejected. The Rohm and Haas court provided a detailed analysis of CERCLA concerning the propriety of limited judicial review. Applying the Supreme Court's dictates in Mathews v. Eldridge, 424 U.S. 319 (1976), the court held that CERCLA's record review limitation satisfied Constitutional due process requirements -- it provides for public participation and subsequent review by an agency with the necessary expertise, judicial review of agency's decision, and judicial de novo review only of a potentially responsible party's liability at the Site.

U.S. EPA fully followed the NCP in this case, thereby providing Defendants' with adequate process.²⁶ The NCP provides:

(3) Community relations to support the selection of remedy.

²⁶ Of course, in Phase II of this case, the Defendants will have the opportunity to contest their liability at this Site -- which will then be determined de novo by this Court.

- (i) The lead agency, after preparation of the proposed plan . . . shall conduct the following activities:
 - (A) . . . ;
 - (B) Make the proposed plan and supporting analysis and information available in the administrative record . . . ;
 - (C) Provide a reasonable opportunity, not less than 30 calendar days, for submission or written and oral comments on the proposed plan and the supporting analysis and information Upon timely request, the lead agency will extend the public comment period by a minimum of 30 additional days. . . . (Emphasis added).

Furthermore, U.S. EPA provided more process at this Site than the minimum that Defendants were due. Since agreeing to reopen the record, U.S. EPA extended the public comment period twice, allowed U.S. EPA's experts to meet with the Defendants' experts, and included a preliminary analysis of U.S. EPA's views at the Site. Now, Defendants simply want another "bite at the apple."²⁷ This is not allowed. If true, there would never be finality -- Defendants would reply to U.S. EPA's response to their initial comments, U.S. EPA would then respond to the Defendants' reply, followed by a surreply, etc. cf. Ethyl Corporation v. Environmental Protection Agency, 541 F.2d 1, 52 (D.C. Cir. 1976) cert. denied, 96 S.Ct. 2662 (1976)

²⁷ As set forth, above, to the extent Defendants seek consideration of information not before U.S. EPA at the time U.S. EPA selected the remedy for this site, the appropriate mechanism is placement of such information into the administrative record, in accordance with U.S. EPA regulations set forth at 40 C.F.R. § 300.825(c), not supplementation of the existing record via discovery. To the extent the issues highlighted by the Defendants have previously been made known to U.S. EPA, Defendants are not now entitled to a second bite at the apple via discovery. See Pennsylvania Protect Our Water and Environmental Resources v. Appalachian Regional Commission, 574 F. Supp. 1203, 1215 (M.D. Pa. 1982), aff'd without opinion, 720 F.2d 659 (3d Cir. 1983).

Furthermore, Defendants imply, by citing to U.S. EPA's "Final Guidance on Administrative Records for Selecting CERCLA Response Actions," that U.S. EPA failed to follow its guidance. See Guidance, attached as Exhibit E. This is perplexing. While they cite to the general statement of the law in the introduction section of the Guidance, they fail to cite to the specific provision of the guidance on public comment procedures. See Guidance p. 13-14. There, consistent with the NCP, U.S. EPA states that comment on the proposed plan and supporting analysis is necessary for judicial review. Nowhere does the Guidance or the NCP provide for an additional requirement that U.S. EPA extend yet another comment period -- necessitating yet another review, and so on.

U.S. EPA fully complied with the NCP and its Guidance here. On October 14, 1994, U.S. EPA reopened the comment period on the residential soil cleanup level with publication and service of the Proposed Plan and supporting analysis. This is all that was required by the NCP and Guidance. Moreover, U.S. EPA chose to go one step further. U.S. EPA provided three times the amount of time provided in the NCP, and, as mentioned above, before releasing the Proposed Plan, and to facilitate an informed comment, U.S. EPA included a detailed expert response by Dr. Marcus that presented an evaluation of, among other things, the data from the Madison County Lead Exposure Study, site-specific information, and computer modeling with the IEUBK model.

Thus, U.S. EPA has provided more than the minimum requirements of CERCLA, the NCP, Agency Guidance, and due process.

Defendants also claim that U.S. EPA has played "hunt the peanut" -- that U.S. EPA hid technical information which the Agency relied upon to support its cleanup decision. Defendants cite to Connecticut Light & Power Co. v. NRC, 673 F.2d 525 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982), for the proposition that an agency must disclose its analysis before public comment is invited in order to effectuate that comment. There, the court held that an agency must identify the grounds for its proposed rule in order to satisfy public participation requirements. In accord with Connecticut Light & Power, U.S. EPA did identify the grounds for its decision in, among other documents, the ROD, the Proposed Plan, Dr. Marcus' Preliminary Report, and discussions at the meeting of the experts. Furthermore, the Connecticut Light & Power court held that the NRC's rule, imposed as part of its general rulemaking authority, was not arbitrary or capricious even where many documents that formed the basis for NRC's opinion were not in the administrative record. Here, all the documents are included in the Record.

The Defendants do not claim that they were deprived of the opportunity to present any evidence or argument they wished to the decisionmaker for inclusion into the record. Rather, they claim that they were not given adequate information on what U.S. EPA was going to do in order to provide meaningful comment. This is absurd. It strains reason how the Defendants can now

claim that after two years of discussing the residential soil cleanup standard with the Defendants, meetings between the Defendants' and U.S. EPA's experts, inclusion in the Record with the results of those meetings, U.S. EPA's inclusion in the Record before the comment period commenced of dozens of relevant scientific studies, and Dr. Marcus' preliminary analysis, the Defendants were unaware what analysis U.S. EPA was performing at this Site.

The Administrative Record here is complete, with a decision which is clear on the relevant issues. This satisfies the requirements of CERCLA, the NCP, Agency Guidance, and due process.

3. U.S. EPA Has Considered All Relevant Factors in
Selecting the Remedy for the Site

Defendants claim that U.S. EPA has failed to consider all "relevant factors" in reaffirming the residential soil cleanup level. However, nowhere do Defendants list the "relevant factors" they claim U.S. EPA failed to consider. To the contrary, U.S. EPA has considered all relevant factors in selecting a remedy for the Site. Those factors are enumerated in the NCP, 40 C.F.R. § 300.430(g) and (f):

Threshold Criteria:

1. Overall Protection of Human Health and the Environment
2. Compliance with Applicable or Relevant and Appropriate Requirements (ARARs)

Primary Balancing Criteria:

3. Long-term Effectiveness and Permanence
4. Reduction of Toxicity, Mobility, or Volume through Treatment
5. Short-term Effectiveness

6. Implementability
7. Cost

Modifying Criteria

8. State Acceptance
9. Community Acceptance

U.S. EPA considered each of these relevant factors in selecting the remedy for this Site. The DD/ESD (SAR No. 377) explains, in detail, how evaluation of each of these criteria led to U.S. EPA's selected remedy. SAR No. 377, pp. 13-17, and 20-21. The support for the conclusion reached in the DD/ESD is included in many areas of the Administrative Record. See generally, RI/FS Report AR Nos. 32, 37, 151, 152; ROD, AR No. 217; Proposed Plan, AR No. 153; ROD, AR No. 217; Supplemental FS, SAR No. 342; Proposed Plan, SAR No. 148, SAR No. 145.

The Defendants claim that U.S. EPA failed to include comments on the Marcus Report and the question of whether other alternatives would be equally protective of human health than the remedy selected. Defendants' Brief, pp. 11-12. This is simply untrue and, even if true, would not permit record supplementation. Defendants do not point out that nearly the entire DD/ESD, and the Marcus Response in particular, is a response to the Defendants' assertion that their preferred alternative remedy is protective. U.S. EPA has concluded that the Defendants' remedy is not protective. Again, this is not a question of completeness of the record, it is a question regarding the Agency's resolution and its decision which the Court may now review. U.S. EPA stands on the certified

Administrative Record, including its cleanup decision in the record, which is neither arbitrary nor capricious.

4. Defendants Have Not Shown that U.S. EPA Acted in Bad Faith

Bald accusations of bad faith are insufficient to pierce the discovery bar in record review proceedings. See Friends of the Shawangunks v. Watt, 97 F.R.D 663, 667-668 (N.D.N.Y. 1983)

("Indeed, in order to overcome the presumption of validity in administrative action . . . [the] party . . . must show specific facts to indicate that the challenged action was reached because of improper motives."). See Animal Defense Council v. Hodel, 840 F.2d 1432, 1437 (9th Cir. 1988), corrected, 867 F.2d 1244 (9th Cir. 1989); Volpe, 401 U.S. at 420.

The Defendants have only made a misdirected bald accusation of bad faith for which they now claim discovery is permitted. Contrary to the Defendants' assertion, at no time did U.S. EPA "predetermine" or vacillate on the residential soil cleanup level. Rather, U.S. EPA looked at supportive and unsupportive evidence to reach its selected remedy. See DD/ESD, SAR No. 377, ROD, AR No. 217. Defendants also do not explain how U.S. EPA could both vacillate on the remedy, and predetermine it at the same time. In any event, since the time that Defendant NL concluded the RI/FS for the Site and first submitted its remedy proposal, U.S. EPA has relied upon a myriad of medical, technical, scientific, as well as historical bases for selecting the remedy for this Site. That is, U.S. EPA used site-specific information as well as its expertise in the field of lead

hazards. Furthermore, scientific understanding of lead risks has been in a state of refinement, and will continue to be refined, long after this Site is cleaned. See DD/ESD, SAR No. 377, ROD, AR No. 217. The Defendants do not disagree that scientific understanding of lead has changed through the years. U.S. EPA, at each juncture of public participation for the remedy, has responded to these new understandings. That is, the Defendants mistake U.S. EPA's recognition of developing science, and inclusion of newly discovered information in the Record, for vacillation.

Furthermore, Mr. Brad Bradley, U.S. EPA's Remedial Project Manager for the Site, has never declared, despite the Defendants' claim, that the Madison County Lead Exposure Study would have no effect on the soil cleanup level. To the contrary, the DD/ESD, and the Marcus Response in particular, demonstrate how the Exposure Study actually supports U.S. EPA's cleanup. In addition, the Defendants claim Mr. Bradley's alleged statements, taken from three newspaper stories from 5 years ago, demonstrate bad faith.²⁸ While we deny the accuracy of these newspaper stories, a simple glance at the DD/ESD, and Dr. Marcus' Response in particular, is proof that U.S. EPA carefully considered the Exposure Study and found, contrary to Defendants' characterizations, that the study supports U.S. EPA's cleanup.

²⁸ Newspaper articles "raise[] serious admissibility problems." National Labor Relations Board v. Cutting, Inc., 701 F.2d 659, 667 n.7 (7th Cir. 1983), citing Pallotta v. United States, 404 F.2d 1035, 1038 (1st Cir. 1968); Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100, 1232 n.198 (E.D. Pa. 1981).

Again, Defendants' argument is with the substance of U.S. EPA's cleanup decision, not the alleged statements by a U.S. EPA employee.²⁹

VII. Disagreements Among Experts is Precisely Why Supplemental Materials Cannot be Considered by this Court

As mentioned above, the majority of the Defendants' alleged factual assertions belong in their substantive brief on whether U.S. EPA's remedy should be upheld, not within this procedural brief. Furthermore, to the extent that experts may differ on the propriety of the remedial decision, such allegations do not form a basis to permit a new record to be developed in this Court beyond the existing record. See Florida Manufactured Housing Ass'n, Inc. v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995), ("[w]hen the agency is confronted with opposing views among specialists, it must be given the discretion to rely on the reasonable opinions of its own experts, even if a court finds other views more persuasive."); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1144 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992) ([c]onflicting expert opinion . . . is not sufficient to allow a reviewing court to conclude the agency decision was arbitrary, capricious or any abuse of discretion."). An agency decision is not rendered arbitrary or capricious merely because the challenger's viewpoint may

²⁹ Mr. Bradley is the Remedial Project Manager for the Site and is not the delegated authority under CERCLA charged with making remedial decisions. At no time have Defendants ever alleged that the decisionmaker has made statements predetermining the remedy.

also be supported. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

The Defendants' real complaint is that they believe that U.S. EPA has reached the wrong result. They may well have experts who would be prepared to testify to that effect, if allowed. But, as the Supreme Court and several other courts have said, administrative action may involve complex problems, and where "experts may disagree; they involve nice issues of judgment and choice . . . which require the exercise of informed discretion." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-19 (1958). Such decisions are not for the courts to make or revise. The kind of technical, factual decision by an administrative agency involved here is the kind always subject to limited review by the courts. As pointed out in Ness Investment Corp. v. United States Department of Agr., Forest Service, 512 F.2d 706, 712 (9th Cir. 1975):

Thus, what the plaintiffs are asking of the Court is to be architect, planner, engineer, conservationist, water recreation expert, financier, etc., all rolled into one in setting such conditions. The Federal Courts have no jurisdiction and no expertise to set such conditions and terms . . .

See also, Hercules, Inc. v. EPA, 598 F.2d 91, 115 (D.C. Cir. 1978). There is even less reason to explore such matters where the "issues involved are at the 'very frontier of scientific knowledge' and such disagreements [among experts] does not preclude [the court] from finding [U.S. EPA's] decisions are adequately supported by the evidence in the record." Lead

Industries Ass'n v. EPA, 647 F.2d 1130, 1160 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

It may be that LIA expects this court to conclude that LIA's experts are right, and the experts whose testimony supports the Administrator are wrong. If so, LIA has seriously misconceived our role as a reviewing court. It is not our function to resolve disagreement among the experts or to judge the merits of competing expert views. . . . ("[c]hoice among scientific data is precisely the type of judgment that must be made by EPA, not this court"). Our task is the limited one of ascertaining that the choices made by the Administrator were reasonable and supported by the record. [Footnote and citation omitted]

Id.

There may not be discovery in this proceeding for the purpose of exploring the bases for the differences of opinion of experts or technicians. Either U.S. EPA's decision is supported by its administrative record, or it is not.

VIII. The Court May Seek Assistance from a Technical Advisor but May Not Consider Expert Opinion Evidence

Defendants offer an additional reason why this Court should expand the scope of review beyond the Administrative Record. Defendants suggest that, because the DD/ESD and supporting Administrative Record are "complex" and "technical", this Court should admit into evidence expert opinion testimony not contained in the Administrative Record.

Defendants appear to be confusing several concepts. Defendants state that they should be entitled to offer their experts' opinions on the correctness and wisdom of U.S. EPA's remedy decision. In this manner, Defendants seek to have yet another opportunity to attack U.S. EPA's remedy through in the form of 'expert' opinion testimony which they could have, but did

not, submit during the public comment period. What they are really seeking is de novo review of U.S. EPA's remedy decision.

Defendants also claim that extra-record testimony is necessary to "explain" the complex documents contained in U.S. EPA's decisional document and in the Administrative Record. See Defendants' Brief, p. 19. Defendants suggest that this extra-record expert testimony is appropriate to assist this Court in understanding the technical and complex nature of this record.

This concept is not completely incorrect because this Court, faced with complex and technical issues in a record review case, may appoint a technical advisor with expertise in a certain area to help explain the record. See e.g. Reilly v. United States, 863 F.2d 149 (1st Cir. 1988); See also Asarco, 616 F.2d 1153, 1159 (9th Cir. 1980). This Court has already identified a means and method for appointing an expert technical advisor for the Court to accomplish this very purpose. This Court has devoted substantial effort, time and resources towards addressing the appropriate manner and timing in which to appoint a technical advisor and has received significant input from the parties on this issue.

Contrary to this Court's intention to appoint an expert advisor, Defendants suggest that they should be entitled to offer "expert evidence on the subjects discussed" in affidavits which they have attached to their brief. See Defendants' Brief, p. 20. That is, Defendants are attempting to bootstrap this Court's apparent desire for expert advice to aid in understanding matters

in the Administrative Record into a free-for-all where experts testify on whatever subjects Defendants decide are relevant. If this were de novo litigation, Defendants would be able to use experts to offer their own opinions based on matters recognized in Federal Rule of Evidence 703. But, this is not de novo litigation, and Defendants' position that it is appropriate to take expert testimony on matters outside the record, and to create a new record in this Court, is incorrect.

The mere fact that the Defendants may be able to produce experts who are willing to testify that they do not agree with U.S. EPA's remedial selection, or who would have used a different methodology in choosing a remedy, is not sufficient justification for this Court expanding the scope of review beyond the Administrative Record. See, e.g., Akzo, 949 F.2d. at 1428. Defendants had an opportunity to submit expert analysis to the Record for the U.S. EPA decision maker and, in fact, did so.

In a record review case, the focus is on the record before the Agency, not on a new record in this Court. Camp v. Pitts 411 U.S. 138 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). A reviewing court is not empowered to conduct a de novo inquiry into the matters being reviewed and to reach its own conclusions based on such an inquiry. Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985). While expert assistance may be permitted in cases limited to judicial review of administrative agency decisions, as in this case, such assistance is circumscribed. It is to help the court in circumstances where

the objections to the agency's decision, together with the agency's response to those objections, are so technical that the court is unable to adequately review the agency's decision. See e.g., Akzo, 949 F.2d at 1428; Asarco, 616 F.2d at 1159.

Although no technical advisor has yet been appointed, if the Court should ultimately select an advisor, that advisor cannot submit information to the Court which goes beyond the administrative record or offer opinions regarding U.S. EPA's remedy selection -- this would violate the limitation on judicial review. That is, a technical advisor should serve only to assist the Court in understanding or explaining scientific and technical data in the record already before the Court. It would be inappropriate for such an advisor to engage in any independent factfinding, and the advisor should not offer any evidence, make or suggest any findings, or offer any opinions. Reilly v. United States, 863 F.2d 149, 157 (1st Cir. 1988) (A technical advisor, if appointed, should not usurp the "judicial function."); citing Reed v. Cleveland Board of Education, 607 F.2d 737, 747 (6th Cir. 1979); Johnson v. United States, 780 F.2d 902 (11th Cir. 1986); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 706(01) (1988). See also Asarco, 616 F.2d at 1160 ("Consideration of evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record.")

Defendants' reliance on Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 983 (D. Colo. 1989), is

misplaced. There, the court accepted affidavits of two individuals to explain the use of a particular computer model used for forest planning. The Court accepted the affidavits to assist it in "understanding the complex issues presented". Id at 983. The court, however, specifically rejected the notion -- advocated by Defendants here -- of accepting opinion testimony of an expert "to refute the analysis of the agency." Id. at 989. This Court, relying, in part, on Citizens for Environmental Quality has itself declined to admit evidence outside the administrative record when reviewing agency action. See Glisson v. United States Forest Service, et al, 876 F. Supp 1016 (S.D. Ill. 1993) (Case No. 92-4205-JLF, Foreman, J.), aff'd, 51 F. 3rd 275 (7th Cir. 1995) ("The Court must only consider whether the Forest Service made an erroneous decision based on the record before it.")

Similarly, in the other cases cited by the defendants, each court, although accepting explanatory affidavits, explicitly rejected the notion that evidence outside the record should be used to evaluate the agency's decision. In Arkla Exploration Co. v. Texas Oil & Gas Corp. the Eight Circuit held:

[W]hen a court reviews agency action, it may not consider evidence outside the administrative record for the purposes of substituting its judgment for that of the agency.

734 F.2d.347, 357 (8th Cir. 1984) (emphasis added). The Arkla Court went on to say that the district court had appropriately "admitted and used supplementary evidence only to explain the record and determine the adequacy of the procedures followed and

the facts considered . . . " Id. at 357 (emphasis added). In that case, unlike here, there were items considered by the agency which were admittedly not part of the administrative record. Id. at 357. The Court held that record supplementation of an explanatory nature should occur only "if necessary". Id. at 357, citing Independent Meat Packers Assoc. v. Butz, 526 F.2d. 228, 239 (8th Cir. 1975), cert. denied 424 U.S. 966 (1976).

In Akzo, the Sixth Circuit found that it was appropriate for the district court to consider an affidavit which was submitted outside the administrative record only for determining the adequacy of EPA's decision and not to determine whether EPA's decision was the best one available. Akzo, 949 F.2d. at 1428 (emphasis added).³⁰ See also Idaho Conservation League v. Mumma, 956 F.2d. 1508, 1520, n. 22. (9th Cir. 1992) (court examined affidavit to explain agency action).

Courts have examined supplementary information in record review cases for limited purpose of explaining the record, only when the record presented does not provide an adequate basis for judicial review. See e.g. Coleman v. Block, 663 F. Supp. 1315, 1320 (D.N.D. 1987), vacated on other grounds 864 F.2d 604 (8th Cir. 1988), cert. denied sub nom Coleman v. Yeutter, 493 U.S. 953 (1989). The Court's inquiry is "confined to the full administrative record before the agency at the time the decision

³⁰ As noted above, in footnote 19, the Akzo Court was confronting a entirely different set of circumstances, where the State of Michigan -- who has a statutory right of concurrence on U.S. EPA's remedy selection -- had submitted an affidavit during the public comment period for the entry of a consent decree.

was made." Ohio v. Sullivan 789 F. Supp. 1395, 1395, 1402 (S.D. Ohio 1992), citing Camp v. Pitts 411 U.S. at 142 (Court rejected attempt to introduce additional testimony from two experts attacking the [agency's expert's] statistical methodology). Supplementary affidavits should not be considered where the "issue . . . was fully and adequately addressed in the evidence submitted to the [agency] and was analyzed and explained in cogent fashion by the [agency] in its decision." Ohio v. Sullivan at 1400.

In the present case, however, defendants are not arguing that the Court should hear supplemental information to explain U.S. EPA's decision. Instead, they propose to offer opinion statements, conclusory in nature, from retained experts not for the purposes of explaining technicalities in the record, but in order to disagree with the agency's decision. Implicit in Defendants' assertion is that now is the appropriate time for them to offer expert opinion on U.S. EPA's remedy selection. This concept is misguided. It proceeds from the mistaken notion that Defendants are free to "litigate the remedy" in this Court. As set forth in great detail, above, this is not permitted.

Furthermore, Defendants have made no showing that the information upon which Dr. Bornschein or Dr. Bowers base their 'opinions' was not available during the public comment period.³¹

³¹ Defendants argue that Dr. Bowers could not offer her 'opinion' on the correct method for determining the remedy until Dr. Marcus' response to comments contained in the DD/ESD. This simply misstates the facts. The information available to Dr. Marcus was available to Defendants since before
(continued...)

In fact, the information referred to by Dr. Bornschein was obtained as a result of the September 21, 1994 in-court settlement agreement while the Administrative Record remained open for the submission of comments. The United States has repeatedly asked the City to provide U.S. EPA with any data which may have been obtained by Dr. Bornschein during his study. To date, the City has failed to supply the United States with this information. In fact, Dr. Bornschein is listed as one of the authors in at least 6 documents contained in the supplemental administrative record. (SAR Nos. 35, 61, 62, 65, 71).

Furthermore, Dr. Bornschein participated in the meeting of each parties' experts convened as a result of the in-court settlement. The result of that meeting was a "Consensus Statement" submitted to the administrative record and considered by U.S. EPA during its remedy selection deliberations. See SAR, No. 353, (Consensus Statement, 2/7/95).

³¹(...continued)

the record was re-opened. (In fact all of the data collected for the IDPH study was available to the City's consultant, Dr. Kimbrough, long before it was made available to U.S. EPA.)

In addition, as Defendants point out, U.S. EPA included Dr. Marcus' "Preliminary Assessment of Data from the Madison County Lead Study and Implications for Remediation of Lead-Contaminated Soil" (SAR No. 145) in the Record during the public comment period to advise Defendants and the public on U.S. EPA's approach to the analysis of the Health Study. See Defendants' Brief, p. 17. Dr. Marcus identified U.S. EPA's intended analysis:

1. To assess the results described in (IDPH 1994) for use in evaluating childhood lead exposure in Madison County;
2. To provide site-specific information about relevant parameters in the EPA Integrated Exposure, Uptake, and Biokinetic Model for Lead (IEUBK Model);
3. To evaluate the proposed soil remediation level of 500 ppm using this recent information.

Accordingly, the cases cited by Defendants emphatically support the conclusion that this Court's review of U.S. EPA's decision must be a review of the Administrative Record under the arbitrary and capricious standard. If anything, the technical nature of this matter is the very reason that this Court's review should be limited to the administrative record. Federal Courts are ill-equipped to engage in de novo review of highly technical evidence. Akzo, 949 F.2d. at 1429. As the Akzo court noted "[S]ection 9613(j) reflects Congress' intent that in this highly technical area, decisions concerning the selection of remedies should be left to EPA . . . " Id. at 1425.³²

CONCLUSION

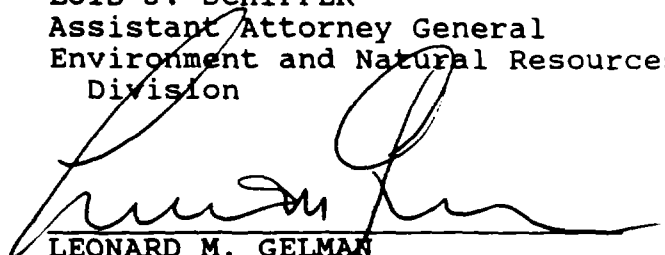
As the foregoing discussion clearly illustrates, any challenge to U.S. EPA's selected remedy must be limited to a review by this Court of the Administrative Record under the arbitrary and capricious standard. Defendants have presented no evidence that would justify this Court departing from this settled principle of law. Moreover, Defendants have presented no evidence that would justify a remand to U.S. EPA to consider new evidence, or to permit any discovery in this Court beyond the Administrative Record.

³² Even if Defendants are correct -- which they are not -- that their expert's opinions could not have been submitted to U.S. EPA for consideration in making its decision, the answer is not to convert this record review proceeding into de novo litigation. The remedy is for the Court to remand the record to the agency and direct U.S. EPA to consider this information. See Florida Power and Light Co. v. Lorion, 470 U.S. at 744.

WHEREFORE, the United States requests that this Honorable Court enter an Order limiting the scope of review to the Administrative Record based on the arbitrary and capricious standard, and prohibit any additional evidence to be presented or discovery taken.

Submitted this 22d day of February, 1996.

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